IN THE UNITED STATES SUPREME COURT

THE GOOD HOLDING COMPANY, CAROLYN G. GOOD TUCKER and OWEN TUCKER,

Petitioners,

versus

FRANCES B. BOSWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered March 8, 1949, rehearing of which was denied April 19, 1949, affirming the judgment of the District Court for the Southern District of Florida, entered on July 15, 1947, in a civil action for malicious criminal prosecution between citizens of different states.

OPINIONS BELOW

The opinion of the court below and a dissenting opinion filed on March 8, 1949, are set forth in the accompanying transcript (R. 391-412), but have not yet been published. There was a dissent but no opinion on denial of rehearing.

BASIS OF JURISDICTION

Federal jurisdiction rests upon diversity of citizenship and the amount in controversy, as provided by Title 28, **United States Code,** section 1332(a)(1).

Review by writ of certiorari is invoked under Title 28, **United States Code,** section 1254(1).

The opinion of the court below, together with a dissenting opinion and judgment, was filed on March 8, 1949. Petition for reahearing was filed on March 26, 1949, and was denied on April 19, 1949, one judge dissenting. An order of the Court of Appeals staying the mandate for thirty days pending the application to this Court for writ of certiorari was entered on April 27, 1949.

QUESTIONS PRESENTED

In a civil action for malicious criminal prosecution, *where the local law is clearly to the contrary,* did the Court of Appeals err in sanctioning the conduct of the District Court in presenting the case to the jury, wherein:

(1) The District Court refused to submit the question whether any of the defendants did in fact institute the criminal prosecution of the plaintiff.

(2) The District Court instructed that if one of three defendants was guilty, all were, though the only evidence of malice or of instigation was as to one of the defendants.

(3) The District Court so defined malice that any prosecution to stop stealing would be malicious.

(4) The District Court, in its charge on the measure of damages, specified only that the verdict could not exceed the amount claimed in the complaint, with the result that judgment was for the plaintiff in the amount of $7000 though plaintiff was in jail but one night, and there was no evidence of actual damage.

Two judges of the Court of Appeals, without discussing any local decisions, affirmed the conduct of the District Court. The third circuit judge, in a written opinion, dissented on the ground that each of the foregoing instructions given by the District Court was in clear disregard of local law.

SUMMARY STATEMENT

Respondent sued the petitioners in the District Court for the Southern District of Florida for malicious criminal prosecution.

On April 4, 1946, respondent had been employed for two weeks as cashier in a cocktail lounge operated in and by the Good Hotel. While at work during the evening of that day, respondent, together with two other employees, was arrested by deputy sheriffs acting under warrants, the validity of which have never been questioned. Respondent was charged with embezzling money from the hotel. She was in jail over night and was released on bond the following day. The charges were dismissed in the Criminal Court of Record on April 25th, because the evidence offered tended to prove theft of liquor rather than embezzlement of cash.

Respondent contended that the petitioners caused her

arrest, that they acted maliciously and without probable cause. The evidence showed that for three months there had been thefts of either liquor or cash or both from the lounge; that Owen Tucker, self-appointed manager of the lounge, employed a firm of private detectives to investigate; and that the firm submitted a written report to him covering investigations made during the period when respondent was employed, which showed that all of the employees pocketed money paid by customers for their drinks. Owen Tucker and his wife, who was an officer and majority stockholder of the corporation which owned and operated the hotel, both testified that they had seen each of the employees steal.

On April 1st, Owen Tucker went to his insurers with these reports. The insurers indemnified his loss. Shortly thereafter he received a call from the county solicitor's office asking him to appear, which he did. The solicitor questioned him, and it is not disputed that he answered truthfully. The solicitor obtained the name of the detective agency and subsequently interviewed the detectives. No affidavits were made by anyone. The matter was left to the *uncontrolled* discretion of the solicitor. There is evidence that at the time of the arrests, petitioners did not even expect that respondent would be arrested.

The only evidence of malice on the part of any defendant was the testimony by the respondent that she had heard Owen Tucker say: "Boy, we've got the goods on them this time. Ten years is a long time for embezzlement." There was no friction between the employees and their employers. There was no interference on anyone's part with the subsequent employment of the arrested employees who had no difficulty in getting other work.

The District Court's instructions on the questions raised by this petition were as follows:

On defendants' instigation of prosecution—

> "The question that you have in analyzing this testimony is not whether or not the defendants brought about this prosecution, instituted it, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony." (R. 298).

On the issue of agency—

> "If there is any liability in this case, if you gentlemen find any liability in this case to the plaintiff, then the conduct of these individuals, the defendants, makes the hotel liable." (R. 297, 296, 288, 64).

On the issue of malice—

> "In a case of this character, malice does not have a technical meaning of a personal hatred or dislike of the individual prosecuted. It may mean that the person bringing about the prosecution was prompted by motives they consider advantageous to them in causing the prosecution to be brought about." (R. 295).

On the issue of damages—

> "The amount of damages is a matter for you gentlemen to determine, an amount that you gentlemen as business men are authorized to determine in your best judgment, of course, not to exceed the amount claimed in the complaint in this case." (R. 298).

The verdict and judgment were for the plaintiff in the amount of $7000.

REASON FOR GRANTING THE PETITION

On each of four vital issues in this case, the District Court gave instructions which plainly ignored the settled law of the State of Florida, which law the federal court was bound to apply. It is, indeed, doubtful if there is precedent anywhere for these instructions.

Two justices of the Court of Appeals approved the instructions given by the District Court in an opinion which cites two Florida decisions and one Texas decision, but relies primarily on eight federal decisions, one of which was reversed by this Court in 1899. **Spurr v. U. S.**, 87 F. 701 (C. C. A. 6th 1898); rev'd. 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

The majority opinion nowhere discusses the adequacy of the trial court's charges, other than to say that "we find no prejudicial error", nor does the opinion discuss any of the Florida decisions in point. It is apparent, not only from the decision, but from the opinion that the Court of Appeals refused to apply the local law, despite

this Court's holding in **Erie R. R. v. Tompkins,** 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

The opinion of the dissenting circuit judge, who relied entirely upon Florida decisions and the **A. L. I. Restatement,** sharply and fully demonstrates the error in the majority opinion.

The case is small. The issues may lack color and are, perhaps, tinged with little national significance. But the clear refusal of our District Court and of the Court of Appeals for the Fifth Circuit to recognize the doctrine of the **Erie** case fully merits this Court's attention.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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